Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1993

JOSEPH M. BENNETT

Petitioner

-Vs-

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

1. Should the government be allowed to obtain success in their convictions with trickery and deceit rather than through an honest use of the procedure given to them by the law?

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The Government should never be allowed to obtain successful convictions with trickery and deceit rather than through an honest use of the procedure given to them by the law

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CONSTITUTIONAL PROVISIONS:

United States Constitution, Amendment V.

OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

On July 8th, 1993, the United States Court of Appeals for the Tenth Circuit affirmed the Petitioners May 18th, 1992 sentencing for kidnapping conspiracy, in violation of 18 U.S.C. sec. 371. This conviction as a result of a plea bargain arrived at on March 2nd, 1992.

On August 12th, 1993, the United States Court of Appeals for the Tenth Circuit denied the Petitioners Petition for Rehearing.

On November 11th, 1993, the Petitioner sent his Petition for Writ of Certiorari to this Court. However, the Petition was in violation of format and page size rules. It was returned to the Petitioner on November 22nd, revised to be in compliance with the Court's rules and resubmitted on December 29, 1993.

STATEMENT OF JURISDICTION

Petitioner, Joseph M. Bennett, moves this Honorable Court for a Writ of Certiorari and review of the Judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-titled cause on July 8, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. sec.1254.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V of the United States Constitution provides in relevant part:

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

STATEMENT OF CASE AND FACTS

On January 31, 1991, Petitioner was indicted for kidnapping Nicole Schoenekase, in violation of 18 U.S.C. sec. 1201(a)(1), and aiding and abetting that charge in violation of 18 U.S.C. sec. 2. The trial ended on July 12, 1991 with the jury deadlocked. The court declared a mistrial, and the trial was rescheduled. Until the morning the second trial was to begin, the Petitioner had absolutely refused any attempts made to plea bargain. But on that morning, March 2, 1992, the U.S. Attorney offered to assist in the investigation of Nicole Schoenekase's on-going abuse at the hands of Richard Dodson (the child's stepfather). In exchange for this, the Petitioner agreed to enter a plea of guilty to a lesser charge of conspiracy, in violation of 18 U.S.C. sec. 371.

Nicole Schoenekase was born on May 12, 1987. The Petitioner and his sisters raised Nicole from the time she was

born until she was eighteen months old. Nicole's mother, Debra Dodson, was then working as a lingerie model and dancer in Chicago taverns. Debra seldom saw Nicole and all the child's clothing, crib, and other necessities were at the home of the Petitioner's sister. She provided all financial support and the child's actual residence was with her. During this time, the Petitioner visited with the child on a daily basis. In September of 1988, while working in Chicago, Debra met Rick Dodson. A few months later, Debra and Rick Dodson left the state with Nicole in violation of a Court order providing visitation to the child's natural father.

Debra's mother and older sister said Rick had connections to the Chicago street gang called the "Latin Kings" and was supplying Debra with drugs. Moreover, Debra's sister and various other people said that Rick and Debra had been selling drugs. Although the Petitioner hoped Debra and Rick would mature with family responsibility, everyone involved in Nicole's care was becoming increasingly concerned for her safety. Testimony later given by witnesses both in Illinois and Colorado showed that Debra was actively using cocaine and other drugs. More important, evidence also established that Rick Dodson had a violent history, including torturing and killing animals.

In February 1989, the Petitioner's sister and Debra's mother visited the Dodsons in Nebraska. On returning, they told the Petitioner they were afraid for Nicole's safety. Rick had not been around much during their visit. Nevertheless, when he was, Nicole acted terrified of him and would go to great pains to avoid him. The Petitioner also learned that Rick and Debra would leave loaded pistols within easy reach of Nicole. Rick had admitted killing one of his dogs while everyone else had gone into town. The Petitioner got the general impression that Rick was an unbalanced sadist and it was not safe for Nicole to be near him.

Later, Debra's mother visited the Petitioner's sister. She said Rick was always beating Nicole. She considered her daughter responsible because she allowed it. Debra's mother also mentioned that Rick and Debra had moved. She said Rick moved often and did not want anyone to know where he lived because he always had outstanding warrants. The Petitioner offered to pay for an attorney to take some type of legal action. Debra's mother declined, saying she could not do that to her daughter.

Then, during the last week of July in 1989, the Petitioner received a call from Debra's brother, David. David said he and his girlfriend had been staying with the Dodsons in Denver, Colorado. David was very upset, and said that Rick

tortured Nicole. Rick carried Nicole around by the hair and was always kicking and hitting her. Nicole always had bruises and black eyes, and was afraid to eat when Rick was around. David said he once came into the house and found Nicole sitting on the floor being made to eat dog food while Rick and Debra were eating at the table. David said Rick loved to torment Nicole and would spit in her food and make her eat it or spit in soda cans and make her drink it. When Rick wanted to do something to Nicole he would say "come to daddy" and, though shaking in fear, Nicole knew she had to come. David strongly felt that Rick did much worse to Nicole when he was alone with her. Later, other witnesses to Nicole's treatment would express this same idea. David said Debra had married her drug supplier and given Nicole to him to torture in return for a reliable supply of drugs.

The Petitioner asked David how he could allow Rick to do this. David said he had fought with Rick more than once and reminded the Petitioner that Rick was over six foot three, two-hundred eighty pounds, and usually carried a gun. David said when he argued with Debra about Nicole's treatment, she was usually high on drugs and even when she was not she would not cross Rick. She said she loved Rick and would even kill for him if she had to. David believed that not much could be done for Nicole without Debra's co-operation. Also,

he was afraid that if he tried to get help the police would arrest him along with the Dodsons. This was because David had come to Denver to help Rick buy wrecked late model cars and match their titles to stolen cars. Rick would then sell these cars, sometimes in Chicago. Also Rick would buy, and resell large amounts of cocaine and other drugs. David gave the Petitioner the Dodson's address and phone number and the Petitioner said he would do everything possible to help Nicole.

The next morning the Petitioner called Rick, confronting him about Nicole's treatment. Rick made no denial. Before hanging up Rick said he would "do what he wanted with the little bitch and there was nothing anyone could do about it." The Petitioner called later and spoke with Debra. She said "Rick and Nicole had problems," but would not commit to any action. The Petitioner had to end the conversation because someone came into his office, and during an attempt to call back, found the telephone disconnected. Later that day Debra's stepfather, Norman Roark came to see the Petitioner. He had heard what was happening to Nicole, and was angry. Norman said he was going to Denver to bring back Nicole, even if he had to "shoot the son of a bitch" (Rick) to do it. The Petitioner said a better idea would be to go to Denver with Debra's brother and sister, hire an attorney to represent Nicole, and work with the Denver Family Services. Norman

said to forget it, Family Services was a worthless and inept organization all over this country. They did nothing to keep children from being abused, and statistics show three or four kids murdered each day, **after** their cases were reported. Petitioner could check this himself as it was a matter of record. Further, If the Petitioner thought they would help he was a "complete fool." During further discussion the Petitioner mentioned that he knew an FBI agent. He had met this agent the previous year and had gotten along well with him. Petitioner said that the FBI has jurisdiction over one of Rick's businesses. Namely the interstate transportation of stolen cars. Nicole's situation would have a better chance of being acted upon seriously if it came to the Denver authorities by way of the FBI. The FBI is a national organization and if they were aware of and sympathetic with Nicole's plight, they could begin an investigation of the stolen cars through their Denver office. Then, the FBI could contact the responsible agencies in Denver saying that a potentially fatal situation existed for the child, and must be looked into now. This should have more impact than if we made the report ourselves. Norman agreed this idea might work and was worth trying.

The Petitioner and Norman walked to the Petitioner's office and telephoned the Orland Park, Illinois office of the FBI. The Petitioner explained the situation to Thomas Murray, the

agent previously known to the Petitioner. The Petitioner told Agent Murray that he was not specifically trying to help the FBI catch a car thief, but rather was trying to save the life of a little girl. Agent Murray agreed that contacting the Denver office of the FBI could be an effective way to help the child. The Petitioner also knew from Debra's mother that the Dodson's had involvement in welfare fraud using assumed names and volunteered to provide photos of Debra and Nicole for identification. The agent agreed that photos would be a good idea and asked the Petitioner to try to discover more information about the stolen car operation, in particular information about Rick's Chicago contacts before coming in. A few days later, the Petitioner met with Agent Murray and was able to provide additional information along with the photos. Agent Murray told the Petitioner he had been able to locate an outstanding theft warrant for Rick Dodson. This was a local warrant and would be of no help as long as Rick stayed in Denver. A number of older battery charges were also on his record but they would be of no use either. In later telephone conversations, Agent Murray told the Petitioner that he had contact with a woman in Denver who was working on Nicole's situation and was waiting to hear back from her. Also, he had finally motivated the Denver FBI enough to look into the stolen

cars, but "these things take time." **See** Defense Witness Transcripts, p. 88, ll. 1-17; p. 89, ll. 1-13.

A few weeks later, David's girlfriend, Barbara Boyd, came back to Joliet from Denver. She had been with David while he was staying at the Dodsons, and her story of Nicole's treatment was much the same as David's. Rick would throw things at Nicole, he would make her drink his spit, and he never addressed her by name. He only called her "bitch" or "the little bitch." Rick also said he would have Nicole "working the streets" when she was older. Barbara told of walking into the house and finding Rick standing over Nicole. She was crying, and sitting against the wall with her knees held tightly to her chest. Barbara said Rick was kicking Nicole hard, and was so engrossed in watching Nicole he did not hear her enter. When he realized Barbara was there he became surprised and immediately left. Barbara also told about Rick shooting a dog inside the house. The dog was Nicole's pet and Barbara had to clean up the mess. Barbara said Nicole was withdrawn and would not eat if Rick was around. If Nicole could not leave when Rick entered the room, she would begin to shake all over. Barbara expressed a fear that without her or David there, Nicole would have no one who cared for her, and Rick would kill her. She then said if someone did not do something, Nicole would die and "that someone will not be Debra." When

Rick was torturing Nicole, Debra would pretend it was not happening. Barbara thought that if Rick were to kill Nicole, Debra would help cover it up and no one would know what happened. **See,** Defense witness transcripts, pp. 2-29.

In late October, Debra's mother returned from a visit with the Dodsons. She came to see the Petitioner's sister, and was visibly upset with something Rick had done during her visit. She said Debra had been carrying her new born baby, Jennifer, and accidentally bumped the baby's head. Rick immediately became violent. Nicole was standing between Debra and Rick, and Rick threw Nicole against the wall in his attempt to get to Debra. Rick hit Debra and she dropped the baby. Debra's mother bent over to pick the baby off the floor and Rick kicked her, knocking her down. While she was on the floor, Rick drew back his fist to hit her, but stopped. During the conversation, Debra's mother said Rick beat Debra and he seemed to enjoy tormenting Nicole. He had also stolen a car he was to have sold for her. When the Petitioner asked what she intended to do about Nicole, Debra's mother said she was planning a trip to California and would stop to pick up Nicole if Rick would let her. Petitioner again offered to help her hire an attorney. The Petitioner again told Debra's mother that he would pay for everything if she would sue for custody of Nicole. Again, Debra's mother said that she could not do that to her

own daughter. Petitioner tried to explain that her alliance must be with Nicole, who was an innocent child.

Petitioner then called Agent Murray, saying that Nicole's situation was worse. Agent Murray again said he was working on it and "these things take time." Just because he had not called, did not mean he was not working on it. The Petitioner asked if the woman in Denver whom Agent Murray had previously mentioned contacting was with the Social Services Department. Agent Murray answered "No." The Petitioner had the impression this woman was with the Denver FBI office.

The Petitioner now realized that going to the FBI had been a mistake. If Agent Murray had been frank when he first realized that neither he nor his contacts in Denver would likely be able to help Nicole, the situation would not have become as critical as it then did. Three months passed while everyone concerned with Nicole's safety waited for the FBI to act. The following events left the Petitioner with few options.

In early November 1989 Nicole's situation rapidly became critical. The Petitioner received a telephone call from a man who refused to identify himself. The caller seemed nervous and only wanted to deliver a short message. He stated that he knew Rick and Debra Dodson, as well as, "the little girl named Nicole." Also, he had heard, from Debra's brother, that the Petitioner was trying to do something to help

Nicole. He said it needed to be done fast because Nicole was in bad condition and Rick said he was going to "get rid of her." The Petitioner's pre-trial investigation, made in early 1991, revealed this man was Joseph P. Vega and he had been Rick's best friend for about six years. **See** Exhibit E, Defense Witness Transcript, pp.79-82.

Within days of this telephone call, Debra's mother said that Debra had received a court summons filed by Nicole's father. Nicole's natural father had learned from Debra's brother David where the Dodsons were and what Rick was doing to Nicole. This summons ordered Debra to appear with Nicole in Illinois to explain why she had left the state with Nicole in violation of a Court order.

Nicole's situation became immediately became urgent when Debra's mother told the Petitioner that Rick wanted to take Debra and Nicole to Mexico and said "nobody would ever again know where they were." Petitioner took this information seriously in view of Rick's transitory history and became desperate for a way to help Nicole. On November 7, Petitioner discussed Nicole's situation with his sister. The Petitioner's sister agreed to call the Denver Family Services Department. Later that day and after a number of attempts, she reached a caseworker who told her that if she herself had witnessed the abuse, a report could be taken and put into the file. Then, if

something happened in the future, the report would be there and **may** be investigated. However, as far as emergency action **nothing** could be done. Supporting this telephone call are telephone record's, and Defense witness testimony. **See** Defense Witness Transcript, p.83, ll. 18-25; p. 84, ll. 1-18. At this point it became obvious that if Nicole's relatives and other child abuse witnesses traveled to Denver as had been planed, the only result would be a report written and placed in a file.

At this point the only available option was to allow Nicole's murder. The Petitioner respects the law and realizes its importance. Still, the Petitioner had ample evidence to support his belief that Nicole's situation was outrageous, and she was completely without the law's protection. Regardless, the Petitioner believed that as long as Nicole was still alive he had to try to help her.

Shortly after Nicole left Denver and it became known that Nicole was no longer with the Dodsons, most people familiar with Nicole's treatment were absolutely sure Rick had murdered her and Debra was covering up for him. This included Debra's mother, sister, brother and his girlfriend, neighbors in Denver, Rick's friend Joe Vega, and the Petitioner's sister. Sheryl Hackney, one of Rick's Chicago acquaintances, called the Denver Police and said she thought

Rick had killed Nicole. A record of this telephone call became part of the Denver Police investigation log.

In Joliet, Illinois, on Wednesday, November 21, 1989, the Petitioner telephoned FBI Agent David Kirchner and set up an appointment. During this meeting, the Petitioner told FBI agents Kirchner and Pearson that Nicole needed an attorney to represent her. The Petitioner called Charles Bretz and arranged to meet at his office. Charles Bretz is the son of a minister who is a long time business associate of the Petitioner. Charles Bretz is now 1st Assistant States Attorney of Will County, Illinois. The Petitioner, with Agents Kirchner and Pearson, met with Charles Bretz. The Petitioner first talked with Charles Bretz privately, asking him to represent Nicole. The meeting with the FBI lasted many hours, with additional agents coming to the office. There was much interaction between FBI agents in Denver and Joliet. The Petitioner agreed to the FBI taking custody of Nicole. In return, the FBI agents agreed to investigate Nicole's past treatment, either themselves directly, or, if this were not possible, they would **make sure** that the abuse be investigated by the correct agencies. This was the only thing requested of the FBI, and they willingly agreed. **See** Exhibit D, Defense Witness Transcript, pp. 61, ll. 2-8. After the agents had Nicole

in their possession they transferred her custody to the Illinois Department of Children and Family Services (D.C.F.S.).

The Petitioner had no attorney at this point, and wished to co-operate further with the FBI. First, however, the Petitioner wanted to be sure the FBI would keep its part of the agreement. On Friday, November 23rd, the Petitioner called Agent Pearson to give him the location of certain child abuse witnesses. Agent Pearson said the FBI was working on a kidnapping investigation, not a child abuse investigation. The next day, a Denver newspaper reported that Rick and Debra would take custody of Nicole the following Monday. This would take place after a Joliet Circuit Court hearing set to determine Nicole's natural father's visitation rights. It was now obvious that the FBI agents had lied, and as a result Nicole still was in a dangerous situation. The Petitioner called Debra's older sister and explained what was happening. She said she had been trying to find an Attorney to represent Nicole herself and readily agreed to come to Joliet and speak with Charles Bretz, who already represented Nicole. She came the next day and signed a petition asking the Court to keep Nicole in state custody, appoint an attorney for Nicole, and order a child abuse investigation.

On November 27th, 1989, a Will County Judge allowed this petition. Despite two court orders, the D.C.F.S. did not

investigate the abuse and delays resulted. The D.C.F.S., however, was able to only work with witnesses from Joliet and, as later established, the best witnesses were in Denver. Charles Bretz made repeated requests of the FBI to keep their end of the agreement, but the FBI refused. **See** Exhibit D, Defense Witness Transcript, p.62, ll. 9-15; pp. 67-73.

On December 11th, 1989, the hearing began. Both Debra and Nicole's natural father were each represented by counsel. Nicole had Court appointed counsel. Rick was in Joliet at the time, but stayed away from the hearing. Debra attempted to intimidate some of the child abuse witnesses. This included threatening and physically removing a witness from the courthouse before that witness was to testify. At the conclusion of the hearing four days later, the Circuit Court Judge found Rick Dodson guilty of child abuse and neglect. Debra Dodson was found guilty of child neglect. Unfortunately for Nicole this was only a finding. Prosecution could not be in Illinois because the abuse occurred in Denver. In his closing statement, the Illinois Judge said the most damaging evidence against Debra was her own testimony. A few months later in February 1990, the Joliet Court placed Nicole back into Debra's custody. However, Debra agreed to stipulations including drug counseling, visitation rights for Nicole's natural father, and Court orders instructing Debra to keep Nicole in

Illinois. Shortly afterward, in Chicago during a visitation exchange, Rick assaulted both of Nicole's paternal grandparents. Police records show that Nicole was present during these assaults. Chicago issued Battery arrest warrants for Rick, and these warrants are still outstanding. Then, Rick and Debra **again** took Nicole from the state in violation of the Joliet Circuit judge's stipulations. The judge issued an arrest warrant for Debra, and this warrant is also still outstanding.

In February 1991, fourteen months after the FBI agreed to and then failed to investigate Nicole's abuse, a grand jury in Denver issued the kidnapping indictment against the Petitioner. The subsequent trial ended with a hung jury. FBI Agent Powell is the Denver agent in charge of the investigation. During the trial Agent Powell admitted during testimony that he had Richard Dodson in custody on more than one occasion and failed to contact Adams County, Colorado authorities. This was done despite Agent Powell's admitted knowledge of an outstanding Adams County battery warrant for Dodson. This warrant is still outstanding. The police records show the attack was brutal, leaving the victim with permanent damage as a result of being repeatedly kicked in the head. During this attack Richard Dodson threatened the man he was attacking by saying he would, "kill his wife and kids" if this man were to testify against him. Throughout its

investigation the Government routinely ignored, discounted or attempted to cover-up any evidence of child abuse that would support the Petitioner's position. Further, the FBI passed up many opportunities to gather evidence of abuse in violation of the only condition it willingly agreed to before being given custody of Nicole. The testimony of one of the Petitioner's defense witnesses contains an excellent example of this. **See** Defense Witness Transcripts, p. 81, ll. 10-21; pp. 83-84. The combination of these and various other Government actions led the judge to tell the U.S. Attorney she had the impression he was defending the FBI. She wanted him to know he worked for the people of the United States, the FBI was not his client.

Then, on October 1st, 1991, the Utah Department of Human Services (U.D.H.S.) received a child abuse report concerning the Dodsons. The complaint came from a neighbor (Utah law requires the referent's name be kept secret). The caseworker's notes show; "The mother asked informant where you get drugs." Nicole, referred to as the "4 year old," is described as "extremely frightened." Other excerpts from the caseworker's notes include; "Stepfather is extremely violent ... has weapons ... Mother pushed daughter into 4 year old and injured her eye ... Stepfather beats 4 year old and wife ... has also threatened neighbors ... always covered with bruises ...

she and half the neighbors are afraid this man threatens people with guns ... beat dog." The U.D.H.S. started an investigation. The Dodson's hired an attorney and got letters of reference, including two from a Head start teacher and doctor. The U.D.H.S. concluded the "Dodsons came across as loving and concerned parents ... Nicole is a loved and valued child."

A local city of St. George police detective had been investigating Richard Dodson for another, unrelated crime and decided Nicole's case needed another look. He knew the U.D.H.S. had closed their child abuse investigation without checking with Illinois authorities. This happened despite the Dodson's admitting they had a, "bad experience" with the Illinois child care agencies. Also, the U.D.H.S. failed to check the letters of reference provided by the Dodsons. During his investigation, this police officer found people at the Head Start and various other people and neighbors who reported seeing Nicole with bruises. In Utah this is sufficient evidence for a misdemeanor child abuse charge. The Dodsons, however, had already left the state and a misdemeanor charge does not allow extradition.

On February 28th, 1992, the Friday before the Monday starting date of the Petitioner's second trial, the District judge allowed a Government motion to withhold the Illinois child

abuse finding from the Petitioner's jury. During the hearing that day, the Petitioner's attorney told the judge she had "torn the heart" from his case. This ruling was a surprise because the Government had filed a similar motion before the Petitioner's first trial and the Judge **allowed** the child abuse finding. The Petitioner's attorney believed the Government's motion did not have sound legal foundation and speculated the judge was engaging a ploy to force a plea bargain. Still, the Petitioner had fourteen witnesses in Denver ready to testify in his defense. These included witnesses that would rebut various positions the Government had previously taken. More important, the Petitioner's defense had a number of new child abuse witnesses located since the first trial. In contrast to what happened at the Illinois child abuse hearings, most of the Denver witnesses were not afraid and very willing to testify if it would help Nicole. Moreover, the judge had placed limitations on the use of the Illinois child abuse finding during the first trial. Withheld from the jury was the fact that the Dodsons were in violation of the agreement they entered as the condition of Nicole's release to their custody. So, even without the finding, the Petitioner had confidence in his defense and in the legal process to uncover the truth. More important, the Petitioner had sufficient strength in his convictions.

Nevertheless, the Petitioner's attorney had panicked and was frantically pushing for a plea bargain. This resulted in a heated argument when the Petitioner arrived at his attorneys office the evening before the trial. Despite this and the various other pressures, the Petitioner maintained his innocence of the charge, and refused to enter any plea agreement. Then, on the morning the trial was to begin, the situation changed. After spending millions of dollars trying to send the Petitioner to prison, and using the taxpayers resources in an attempt to cover-up evidence of child abuse, the Government appeared to have changed its mind. The U.S. Attorney promised to assist the Petitioner in trying to protect Nicole from what is an abusive and dangerous environment. Legal recourse made available for Nicole has been the Petitioner's goal throughout this ordeal. The prospect of Nicole having an ally in the U.S. Attorney's office was enough to persuade the Petitioner to change his plea to guilty. A transcript of the March 2nd, change of plea hearing is marked as Exhibit F. **Before**, as well as during this proceeding the U.S. Attorney made promises. The transcript shows; "If there are witnesses that need to be talked to ... I'll be happy to do it personally", "... there will continue to be a free flow of information...", "if he has any special requests that they want me to interview someone, I'll be happy to do it." "But if there is anything I can

do to facilitate an investigation, talking to folks, I'll be happy to co-operate and do that." **See** Exhibit F, pp. 94-96.

At the time the Petitioner entered the plea agreement, he was indigent. He had exhausted his resources defending himself in the first trial and preparing for the second. The story was being reported on both the newspaper and television in both Illinois and Colorado. The U.S. Attorney had become aware of rising public criticism regarding his handling of the affair and was only too willing to offer a generous deal. Since the first trial, the District Court Judge had pushed for a solution she described as "extremely sensible" in light of the fact that a guilty jury verdict would require her to sentence the Petitioner to prison. **See** Exhibit F, p. 86, ll. 19-21; p. 87, ll. 1-6.

Debra's sister and other out-of-state Defense witnesses were in Denver for the Petitioner's second trial. After the plea agreement, they wanted to stay in Denver a few days to allow the Denver Police an opportunity to interview them. Debra's sister went to the Denver Police Station on March 2nd -- the same day as the Petitioner's plea agreement. She spoke with Sgt. Robert Padilla and provided him with some background information and statements from various witnesses. She later told the Petitioner that Sgt. Padilla appeared interested in the case. He told her he would interview the child abuse witnesses and talk with the U.S. Attorney and the FBI The

Petitioner then made an appointment himself and asked two of the Dodson's Denver neighbors to also be there. During this meeting the Petitioner explained to Sgt. Padilla the nature the plea agreement, including the U.S. Attorney's promise to help interview witnesses. Then Sgt. Padilla briefly spoke to the witnesses who came with the Petitioner and said the District Attorney had to make the decision. The Petitioner left Denver and later discovered that these interviews were the **only** ones ever done by the Denver Police Department. In fact, one witness said he repeatedly. and unsuccessfully, tried to make an appointment to see Sgt. Padilla. On April 9, 1992, Kyra Jenner, a Denver District Attorney, mailed a letter to the Petitioner's attorney saying that a misdemeanor child abuse charge could not be proven. A short time after this Kyra Jenner began work at the U.S. Attorney's office. Her job places her under the supervision of James Allison, the U.S. Attorney in charge of the Petitioner's prosecution.

Two months after entering the plea agreement, the Petitioner learned that the Government, contrary to its promises made in that agreement, continued to discount the child abuse allegations, and, in yet another violation of the agreement, was continuing to investigate him. The Petitioner first learned this from a lady who lives in Loveland, Colorado. Her name is Ellen Carver and she is a housewife with children

of her own. She initially became aware of Nicole's situation from news reports and, after talking to the Petitioner, became active in the attempt to help Nicole. She contacted a number of people, including both the U.S. Attorney and the investigating Denver FBI agent. She believed Nicole was in "grave danger" and wanted to help her. During conversations with Ellen Carver the U.S. Attorney is described as "defensive of Dodson and belittling of any danger to Nicole". Agent Powell told Ellen Carver the basis of the case had been a "love triangle," Rick was a "misguided young man," and Nicole was in no danger. **See** Exhibit G. Agent Powell said that the Petitioner was the "criminal," and referred to Rick as a "victim." In fact, the Petitioner has no previous criminal record. In contrast, Rick has an extensive and violent criminal history. Charges that the Petitioner is aware of include many older battery arrests, criminal damage to property, an outstanding theft warrant in Will County, Illinois, two outstanding Chicago, Illinois battery warrants, and also the outstanding Adams County, Colorado battery warrant.

The Petitioner has other witnesses. These people have spoken with investigating FBI agents **after** the plea agreement, and as recently as April of this year. They will testify that the Government is still conducting an investigation, and as before

still describing the same national kidnapping ring conspiracy / love triangle theories. The Petitioner is confident the U.S. Attorney and the investigating FBI agents can continue the investigation until their retirement without finding evidence.

REASONS FOR GRANTING WRIT

The Government should never be allowed to obtain successful convictions with trickery and deceit rather than through an honest use of the procedure given to them by the law.

Standard of Review: A District Court's denial of a presentence motion to withdraw a guilty plea is reviewable by the Court of Appeals for an abuse of discretion. **United States v. Burger**, 964 F.2d 1065, 1070 (10th Cir. 1992). When a Defendant demonstrates that the District Court behaved unjustly and unfairly, there is an abuse of discretion. **United States v. Wade**, 940 F.2d 1375, 1377 (10th Cir. 1991). The District Court abused its discretion when it refused to allow the Petitioner to withdraw his guilty plea after the U.S. Attorney failed to fulfill the promise which induced that guilty plea.

Discussion: "[A] constant factor is that when a plea rests in any significant degree on a promise or agreement of

the prosecutor, so that it can be said to be part of the inducement or consideration, such promise **must** be fulfilled." **Santobello v. New York,** 404 U.S. 257, 262 (1971) (emphasis added). The prejudice to the Defendant determines whether specific performance of the agreement or permitting the Defendant to withdraw the plea is the appropriate remedy for a broken plea agreement. **Santobello,** 404 U.S. at 262-263.

When a Defendant moves to withdraw a guilty plea prior to sentencing, Rule 32(d) of the Federal Rules of Criminal Procedure provides that the District Court should allow withdrawal for **any** fair and just reason. **United States v. Burger,** 964 F.2d at 1070. In 1971, this Court **unanimously** held that it is fair and just to allow a felony defendant to withdraw a guilty plea when that guilty plea was in exchange for a promise that was illusory and unfulfilled. **Santobello v. New York,** 404 U.S. 257, 263 (1971).

When a plea dispute arises before sentencing, the wiser course is to allow withdrawal of the guilty plea without reaching the issue of whether there is a right to withdraw. **United States v. Fischetti,** 475 F.Supp. 1145, 1147 (D.C. N.J. 1979).

A month after the plea agreement the Petitioner found that Sgt. Padilla of the Denver Police Department had done close to nothing in his child abuse investigation. He had briefly spoken with two people who had been neighbors of the Dodsons. This is only because the Petitioner went to the Police Station shortly after the Plea agreement, and these witnesses met him there. The Petitioner personally talked with Sgt. Padilla that day, explained the terms of the plea agreement and the U.S. Attorney's offer to help even to the extent of interviewing witnesses. **See** Exhibit F. On April 9th, Kara Jenner the Denver District attorney mailed a letter to the Petitioners attorney saying that there was not enough evidence for even a misdeameor charge of child abuse. Shortly after this, the Petitioner talked with Ellen Carver and understood what had happened.

The Petitioner immediately asked his attorney to file a motion to withdraw the plea. The filing date was May 7th, 1992, **two months** after the plea agreement and before the sentencing date set for May 18th. At the request of the Petitioner's attorney, Ellen Carver agreed to give a statement. May 11th is the date of her statement. **See** Exhibit G. However, on May 13th, the Circuit Judge denied the Petitioner's motion, **without a hearing** and by way of a Minute Order, and so **gave no reason** for this denial.

At the May 18th sentencing date the Petitioner's attorney requested the Court to reconsider the judgment contained in the Minute Order. Ellen Carver had been supoened and was present. The Court **refused to reconsider** the judgment, **refused to hear** Ellen Carver's testimony and sentenced the Petitioner.

In it's Appellate Court Response Brief the Government irresponsibly claims that the Petitioner filed his motion to withdraw **four days** after the plea agreement, thereby implying that the Petitioner did not respect the court or the seriousness of his plea. This same error then subsequently appears in the Appellate Court's Order. **See** Exhibit A, Order and Judgment, p.49, l.10.

An even more outrageous mistake is the Appellate Court's assertion that the "[t]he District Court denied the motion **after** holding a change of plea hearing ...." **See** Exhibit A, Order and Judgment, p.49, ll. 14-16. There was **no hearing held** on the Petitioner's motion to withdraw his plea. Both the Petitioner's Brief and Petitioner's Reply Brief **clearly** describe the facts of the case. **See** Petitioner's Reply Brief, pp. 11-12. The Petitioner sadly concluded that the Appellate Court's case study did not extend past the Government's

Response Brief. Because of this the Petitioner filed a Motion for Rehearing on July 21, 1993. **See** Exhibit B. The Appellate Court denied this motion on August 12, 1993. **See** Exhibit C.

On the morning of the Petitioner's second trial, after pressure from the District Court judge for a plea agreement and adverse publicity from the media, the U.S. Attorney had an apparent change of heart. Rather than continuing the Government's cover-up of the child abuse, he promised to assist with an investigation. The Petitioner will explain why this is the **key element** of the agreement, and why it's importance was the result of the FBI's manner of investigation. FBI agents in both Colorado and Illinois developed a habit of talking about their theories. This was known because the Petitioner had been approached by people he knew after FBI agents had interviewed them. People who knew something of Nicole's situation dismissed this talk as silly nonsense, and the Petitioner recalls one person telling him these agents were living in "another world". This habit was generally harmless, but it could be deadly. Now, if FBI agents acting in their capacity as investigators for the U.S. Justice Department speak to someone who is in a position to help Nicole and say

there was no child abuse, people tend to believe it. And then, if they are told with a straight face that Nicole was taken by a national kidnapping ring, with a love triangle involved, it will in most cases effectively stop any attempt to help the child.

An example of this very thing took place at the Illinois child abuse hearings. David Kirchner, the FBI agent in charge of the Petitioners case in Illinois, assured the Petitioner, and Nicole's lawyer that the local director of the D.C.F.S. was a friend of his. If the FBI was given Nicole, he was in a position to **personally** make sure Nicole's case was investigated. As it happened a few weeks later the Joliet D.C.F.S. office was ordered by the Joliet Court to do an abuse investigation. The judge received a single page report describing a short conversation with Richard Dodson. Dodson, asked if he had ever abused Nicole, said "no". Agent Kirchner's friend was satisified with Dodson's answer - luckily the judge was not.

It became obvious that the Government could, and would effectively derail any attempt to help Nicole in Denver. So, on the morning of the Petitioners second trial the Petitioner understood that even if he was found not guilty, **especially** if he was found not guilty, the problem with Nicole's situation

would not be solved. In order for Nicole's case to have a fair hearing the Government needed to take their theories and back off. Their help wasn't especially needed but their acknowledgment of the truth was. This is the reason the Petitioner agreed to accept the Government's offer. If nothing else the Petitioner had the right to expect the Government would keep it's collective mouth shut, and quit describing pet theories without basis in the evidence presented at trial.

Imagine, then, the Petitioner's surprise when he found out the Government had not taken its obligation to the plea agreement seriously from the time it was made, if not before. This is precisely what the Petitioner discovered when he spoke with Ellen Carver. She had called to ask the U.S. Attorney and Agent Powell whether there was anything she could do to help Nicole. **She was distinctly told that there had been no child abuse.** The Petitioner was the criminal and he was "trying to manipulate her." **See** Exhibit G.

The Government tries to downplay this incident by claiming Ellen Carver **is not relevant** to this case and that it had no obligation to speak with her about the case. **See** Government Appellate Court Response Brief, p. 8, l. 21. The

Petitioner realizes the Government had no obligation to discuss Nicole's situation with Ellen Carver. Still, the record clearly shows that the Government **did** discuss the case, and the nature of this discussion was in direct violation of both the spirit and letter of the plea agreement. Also, it was an obvious attempt to discourage the then rising public interest in the welfare of Nicole Schoenekase and to dampen a spontaneous and genuinely concerned investigation of the matter. A statement to the effect that Ellen Carver is not important to this case because she is an **"ordinary citizen"** is an outrageous example of bureaucratic arrogance. **See** Government Appellate Court Response Brief, p. 8, l. 5. The record of Nicole's case **clearly** shows what little effective help Nicole has received was by way of concerned relatives, neighbors, family friends, and "ordinary citizens" like Ellen Carver. Nicole is a victim of drug-related child abuse. There are many cases of drug-related abuse resulting in the child's death and a very high percentage of these deaths have been **after** the abuse had been reported to the "proper" authorities.

The U.S. Attorney also states, in a deceptive attempt to downplay his contact with Mrs. Carver, that the Government's

conversations with her were "brief and noncommittal and had no bearing whatsoever on the plea agreement." **See** Governments Appellate Court Reply Brief, p. 8, l. 21. As Mrs. Carver's statement shows these conversations were anything but "brief and noncommittal." **See** Exhibit G. Telephone records show three conversations with the U.S. Attorney alone and several with Agent Reg Powell. Id. at pp. 98-99. During these conversations, Ms. Carver learned the Government was continuing its investigation of the Petitioner. Id. at 98. Clearly, the U.S. Attorney was not doing "anything [he] can do to facilitate the (child abuse) investigation," **See** Exhibit F, p. 95, ll. 18-20, but rather the Government was continuing to investigate the Petitioner in a vain attempt to support its national kidnapping conspiracy ring / love triangle theory. These actions could be for no other reason than to bring further charges regarding this incident. This is in further violation of the plea agreement. Id. at 88, ll. 21-21; 89, ll.1-2.

The record of past Government actions show a clear pattern of entering agreements in bad faith. Nicole's Joliet, Illinois child abuse hearing was held in December of 1989. The Joliet Court had trouble with the case because the abuse

occurred in Denver, and the Joliet Court did not have the jurisdiction to order an investigation in Denver. The FBI is a nationwide organization and was in a position to enlist the help of the proper agencies in Denver. But Nicole's abuse did not fit with official theories and all requests for assistance were ignored. **See** Exhibit D, P. 62, ll. 9-15; p.65, ll.18-23, & pp. 66-73. Then, years after any help could have been effective, after the Joliet Court had long since done everything it could, the U.S. Attorney claims to have fulfilled the key element of the plea agreement by sending documents to the Illinois Department of Children and Family Services. **See** Government's Appellate Court Reply Brief, p. 8. It is the Petitioner's contention that this sending of documents was nothing less than a fraudulent attempt to create a record showing compliance, while doing the **exact opposite.** This belief is easily supported by an examination of the underlying facts, and court records.

The U.S. Attorney was well aware of the Illinois Judge's finding of child abuse. **FBI agents were present during the proceedings** and the Illinois Court records show that **the FBI ordered a complete transcript.** In light of this, it is

astounding that the U.S. Attorney, who is both legally competent and intelligent would not be aware of the following facts and legal implications: The Illinois Court issued a **finding** of both child abuse and neglect, despite not having access to the best witnesses. More important, the Illinois Court had a fundamental legal problem in that it did not have the power to bring child abuse charges for a matter occurring in Colorado. A **finding** of abuse was the best the Court could do for Nicole and it had done this long before. Transcripts of the Petitioner's first trial or anything else for that matter could not help the child's situation in Illinois. These records would have been long since provided if they could have helped Nicole.

Then, the U.S. Attorney claims, on page 2 of his Appellate Court Brief, that the State of Illinois had "jurisdiction over Nicole." This **is not true** and creates another misleading impression. The Joliet Court had to give legal custody of Nicole back to the Dodsons. Further, the U.S. Attorney's cross examination of one the Petitioner's defense witnesses at trial proves he was aware of this. **See** Exhibit D, p. 65, ll. 19-23 & p.66. Illinois has issued only a **misdemeanor** contempt of court warrant for the mother's arrest. Therefore, the U.S.

Attorney knew that releasing records to Illinois Agencies would accomplish **nothing whatsoever** for Nicole. This release of records is the **only evidence offered** by the U.S. Attorney to show compliance with the key element of the plea agreement.

Once past the Government's sending of documents smoke screen a further look at the facts provides a picture of what the Government **really** did. Nicole has lived in at least five states since leaving Illinois. Every one of these moves was preceded by either an arrest or a strong likelihood of Richard Dodson being arrested if he stayed. The U.S. Attorney is in Denver, and to the Petitioner's knowledge, Denver is the only location where good documentation of Nicole's abuse exists. Denver attorneys familiar with the case said the evidence was even sufficient for felony child abuse charges. Denver, Colorado was, **and remains** Nicole's best chance of receiving legal help. The U.S. Attorney had agreed to personally help with the child abuse investigation, even to the extent of interviewing witnesses. **See**, Exhibit F, p. 95, ll. 4-20. The U.S. Attorney claims the Denver Police conducted an "independent" investigation into the child abuse claims and the Government in no way "discouraged or interfered." He

asserts that Kyra Jenner, the local prosecutor, declined the case "without any influence from the federal government." **See** Government's Appellate Court Reply Brief, p.4. However, the following facts **clearly show** that the Government's theories poisoned the Denver Police investigation.

Sgt. Robert Padilla of the Denver Police Department had initially shown great interest in Nicole's investigation when he met with Debra's sister. **Sgt. Padilla said he would talk with the U.S. Attorney and FBI Agent Powell.** Immediately afterward, Sgt. Padilla **actually refused to interview key witnesses**, even to the extent of not allowing requested appointments. Then, the Denver States Attorney, Kyra Jenner, **without talking to any witnesses** and **despite the Illinois Court's finding**, decided there was insufficient evidence to prove even a misdemeanor child abuse charge. Then, very shortly after her decision not to bring child abuse charges, Kyra Jenner went to work for the U.S. Attorney's office. Her new job placed her under the supervision of the U.S. Attorney handling the Petitioner's case, James Allison.

The FBI can conduct their investigations in any way they choose, and they do. They began here by thinking that other

motives besides Nicole's welfare were involved. So far, so good. This idea is perfectly logical and perhaps even these ideas of a "national kidnapping ring" or a "love triangle" should have been explored. But then, without supporting evidence, the theory became reality in the Government's collective mind, and was deemed important enough to defend. Needless to say, this was bad for both the Petitioner and for the Governments case. One result of this was various observations the Petitioner's judge made at trial, including the comment that it appeared the U.S. Attorney was defending the FBI. The judge wanted him to know that he worked for the people of the United States, the FBI was not his client. The Government could not show support for these ideas, despite a multimillion dollar cross-country investigation. Government imaginings were ineffective against real facts, numerous witnesses and the Illinois Court finding.

FBI Agent Powell's statements to Ellen Carver that he believes Dodson is a "victim", and only a "misguided young man" are further supported by his own statements at trial. He admitted his "victim" was in in his company on more than one occasion and had the FBI's protection when Agent Powell

failed to contact Adams County, Colorado authorities only a few miles away. Adams County has issued a still outstanding warrant for this "misguided young man" after a particularly vicious assault, during which the real victim, the person being assaulted, was repeatedly kicked in the head resulting in permanent damage. This victim was then threatened by "I'll kill your wife and kids" if he dared to testify against Dodson. When asked if he had investigated the Dodson's Adams County charges Agent Powell said "yes". When asked what he had done by way of investigation, he said he had asked Richard Dodson if he would take care of the matter and Dodson said he would. The evidence suggests the FBI's investigation into the matter of Nicole's torture at Rick's hand was very much like this FBI Adams County investigation. The Government also did nothing when their "victim" called immediately after the plea agreement and threatened to kill a newspaper reporter, and blow up the newspaper building because he did not like a story describing the Petitioners case.

The events involving Ellen Carver, Sgt. Padilla, and Kyra Jenner, which all occurred within weeks of each other, showed that the Government not only continued to hold these

theories, but also was making them public and, thereby, allowing them to interfere with Nicole's investigation. It is obvious the Government's actions have been to either downplay, confuse, or even try to destroy troublesome facts and Court findings so as to keep their theories and reputations intact. If Government representatives will tell an "ordinary citizen" of their theories they certainly would do no less in conversations with "official" local government representatives such as Kara Jenner, and Denver police officers.

The Government contends that the Petitioner did not present a credible reason for withdrawing his guilty plea. **See** Governments Appellate Court Reply Brief, page 8. When there is objective evidence that the Defendant has been justifiably confused concerning the plea bargain, withdrawal is usually permitted as a matter of course. **Roberts**, 570 F.2d at 1008. **A guilty plea induced by an unfulfillable promise is no less subject to challenge than one induced by a valid promise which the Government simply fails to fulfill. Cook**, 668 F.2d at 320. From the statements made by the U.S. Attorney, the Petitioner had objective reasons to believe that the Government would not try to hide any information, and

would do **anything it could** to facilitate an investigation. **See** Exhibit F, p. 95. Also, the Government would not continue to investigate the Petitioner for the purpose of bringing further charges regarding this entire incident. **See** Exhibit F, p. 88, ll.20-21; p. 89, ll. 1-2. Even if the U.S. Attorney could not discontinue the FBI's investigation, his promise that the Government would not continue its investigation nor bring any further charges regarding this entire incident can properly be challenged under **Cook**. The District Court, however, did not allow the Petitioner a hearing on his motion to withdraw his guilty plea and denied him the opportunity to develop support for his allegations.

If a motion to withdraw a guilty plea alleges facts that might justify relief, the District Court **must** hold a hearing to allow the Defendant adequate opportunity to develop support for his reasons for wanting to change his plea. **Hancock**, 607 F.2d at 337-338; **United States v. Crooker**, 729 F.2d 889, 896 (1984). Also, the District Court **should** give an explanation of its reasons for denying the motion so that a reviewing court can determine whether the District Court acted within its discretion. **Hancock**, 607 F.2d at 338; **Barker v.**

United States, 579 F.2d 1219, 1222 (10th Cir. 1978). Here, the trial court **did not hold a hearing** on the Petitioner's motion to withdraw. This denied the Petitioner an opportunity to develop his reasons for wanting to withdraw the guilty plea. The District Court judge issued her denial of the motion in a minute order, and therefore has **never outlined** her reasons for the denial. These actions deny the reviewing court a clear and complete record with which to determine whether the District Court acted within its discretion. Failure of the District Court to hold a hearing and outline its reasons for denying the withdrawal of the guilty plea when the Government fails to demonstrate any prejudice by allowing the withdrawal is an abuse of discretion. **Hancock** 607 F.2d at 338.

Here, even without an investigation, there is **abundant** evidence that the Government violated both the letter and spirit of the plea agreement even before the sentencing date. This is a **direct violation** of the principles this Court articulated in **Santobello**. "The disposition of criminal charges by agreement between the prosecutor and the accused . . . is an essential component of the administration of justice." **Santobello**, 404 U.S. at 260. The U.S. Attorney's actions in

the instant case make a mockery of this "essential component" of the justice system. The U.S. Attorney agreed to help with the child abuse investigation and, thereby, induced the Petitioner to plead guilty. After attaining the conviction the Government's actions constitute nothing less than subversion.

Normally, there exists safeguards to "insure the defendant what is reasonably due in the circumstances." **See Santobello,** 404 U.S. at 262. Here, those safeguards have failed. The District Court **refused** to allow the Petitioner to present evidence that the U.S. Attorney had broken his plea agreement. The Court also failed to explore whether the Petitioner was justifiably confused as to the U.S. Attorney's promises, even though Petitioner had objective reasons to be confused as to what the U.S. Attorney promised and **would** actually accomplish. The District Court could have **easily** accomplished these tasks through a hearing, and thereby provide some record for review, but it didn't. It also failed to outline its reasons for denying the Petitioner's motion to withdraw his guilty plea. Any **one** of these actions could provide a credible basis for a finding that the District Court abused its discretion. The combination of these actions, in

light of the fact that the District Court wished a speedy resolution to this case, **surely** amounts to an abuse of discretion.

CONCLUSION

In November of 1989 the Petitioner had a rapidly increasing body of evidence showing that Nicole was in serious and immediate danger. Further, it was found she was without legal recourse. The Petitioner simply came to a realization that what was at stake was more important than his personal safety. This Court must understand that the Petitioner does not believe, and has never once indicated a belief that he is above the law. Evidence supporting this statement is contained in the Petitioners willing admission of what he had done, and in his reliance on a lesser of evils defense at his trial.

The FBI agents in charge of the case talked to the Grand Jury and wrote their reports with a certain pride. In describing their agreement to help with Nicole's investigation they only talked of how they had "played to the emotions" of the Petitioner in order to secure the "rescue" of the "victim".

Until the Government discarded their agreement in this haphazard fashion the Petitioner was prepared to co-operate with the Government. This matter would have long since been over, Nicole would be safe today, and the Government would not have spent millions of dollars.

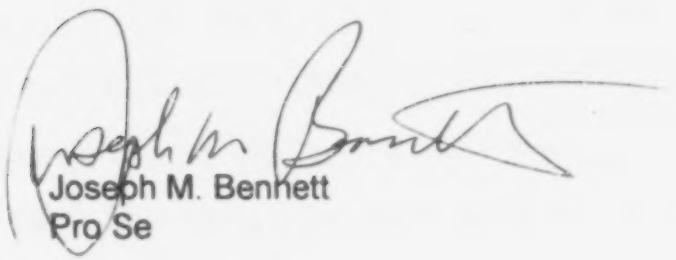
When considering that Nicole is an innocent child, and very likely still being tortured, the Government's self-serving actions become even more outrageous. An unchanging constant throughout this ordeal is that the Government's actions bring disgrace to the justice system, and for Nicole, may bring tragedy. The Petitioner is reasonably confident that Richard Dodson has had second thoughts about his idea of killing Nicole. Other actions, including talk of having her "walking the streets" in a few years are a different matter.

How did the U.S. Justice Department, under the stewardship of James Allison, get into this very odd plea agreement in which the person charged with the "crime" thought it vital he obtain a Justice Department pledge of support for the "victim" he was charged with harming? And, why in the name of heaven, does evidence exist that the Government violated such an agreement? Did the U.S.

Justice Department get into this situation because of an honest use of the tools and procedure given to them by the law? Or - did it happen because the representatives of the Justice Department became so engrossed in "getting their conviction", they forgot that their Federal Courthouse in Denver was built for people in Nicole's situation.

This Court should grant this petition for Writ of Certiorari primarily because the Governments actions in this case make a mockery of this Courts 1971 **Santobello** Decision. A **unanimous** decision such as **Santobello** by it's nature indicates a solid and important Constitutional foundation, and should be affirmed now and then. The Petitioner strongly believes this Petition provides the Court an excellent opportunity to do just that, and the Petitioner respectfully requests that this Court grant his petition for Writ of Certiorari.

Respectfully submitted,



Joseph M. Bennett
Pro Se

CERTIFICATE OF MAILING

I certify that I have served the foregoing PETITION FOR WRIT OF CERTIORI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT upon the other parties herein by depositing true copies thereof in the United States mail, postage prepaid, this 29th day of December, 1993, addressed to the following:

Solicitor General
United States Department of Justice
Washington, D.C. 20530

James R. Allison, Assistant U.S. Attorney
Office of the U.S. Attorney
1200 Federal Office Building
1961 Stout Street, Drawer 3615
Denver, Colorado 80294

Clerk of the U.S. District Court
For the District of Colorado
1929 Stout Street Room C-161
Denver, Colorado 80294

Clerk of the U.S. Court of Appeals
U.S. Court of Appeals for the 10th District
1929 Stout Street Room C-404
Denver, Colorado 80294

Joseph M. Bennett

EXHIBIT A

TENTH CIRCUIT COURT OF APPEALS ORDER & JUDGMENT DATED JULY 8TH, 1993

United States Court of Appeals

Tenth Circuit

United States of America,

Plaintiff - Appellee,

v.

Joseph M. Bennett,

Defendant - Appellant,

July 8, 1993

No. 92 - 1161
(D.C. No. 91 - CR - 29)
(D. Colo.)

ORDER AND JUDGMENT *

Before TACHA, BALOCK, and KELLY, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed.

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

R. App. P. 34 (a) ; 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Joseph Bennett appeals from district court orders denying his motions to withdraw his guilty plea and to receive appointed counsel. We exercise jurisdiction over the first appeal under 28 U.S.C. 1291 and affirm, but dismiss Bennett's appeal from denial of the second motion for lack of jurisdiction.

Bennett pleaded guilty to one count of conspiracy to commit kidnapping in violation of 18 U.S.C. 371 and 1201 (a). Four days later he moved to withdraw his plea, alleging that the government had breached the plea agreement by failing to assist the appropriate state authorities in their investigations of possible child abuse of the kidnapping victim by her mother and stepfather. The district court denied the motion after holding a change of plea hearing and denied an oral motion to reconsider that was raised at the sentencing hearing. Bennett now appeals these judgments, arguing that the government breached the plea agreement when it made statements to a third party which belittled his concerns of child abuse and were "in conflict with the essence of the agreement."

We review the district court's denial of the motion to withdraw a guilty plea for an abuse of discretion. United States v. Wade, 940 F.2d 1375, 1376 (10th Cir 1991). Unless the defendant can show that the district court acted unjustly or unfairly in denying his motion, there is no abuse of discretion. Id. at 1377. We have reviewed the appellate record and find no abuse of discretion. The record establishes that the government complied with the relevant terms of the plea agreement by sending several documents including transcripts and investigative reports, to the appropriate state authorities which have jurisdiction to investigate allegations of child abuse. The government's alleged statements to a disinterested third party do not evidence interference with the states investigation of child abuse, nor do they undermine the cooperation and assistance the government provided pursuant to the plea agreement.

Bennett next argues that the district court erred in denying his motion for court-appointed counsel pursuant to 18 U.S.C. 3006A. Federal Rule of Appellate Procedure 4 (b) requires a notice of appeal in a criminal proceeding to be filed within ten days after the order appealed from is entered. The

timely filing of a notice is "an essential prerequisite to appellate jurisdiction." Turnball v. Wilcken, 893 F.22d 256, 258 (10th Cir. 1990).

In this case, the district court order denying Bennett's "Motion for Reconsideration of Court's finding That Defendant Is Not Indigent" was filed on August 31, 1992. Bennett, who was represented by counsel until October 9, 1992, never filed a notice of appeal from that order. He did file one pro se motion before this court seeking an order declaring that he was eligible for appointment of counsel, but the motion was not filed until November 20, 1992. Therefore, even if we were to treat it as a notice of appeal, see Smith v. Barry, 112 S. Ct. 678, 682 (1992), it would be untimely. Because Bennett failed to file a timely notice of appeal from the order denying his motion, we must dismiss the appeal for lack of jurisdiction.

We DISMISS Bennett's appeal from the district court's refusal to appoint counsel for lack of jurisdiction and otherwise AFFIRM. The mandate shall issue forthwith.

ENTERED FOR THE COURT

Deanell Reece Tacha

Circuit Judge

EXHIBIT B

PETITIONERS MOTION FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

Vs. No. 92-1161
(D.C. No. 91-CR - 29)
JOSEPH M. BENNETT (D. Colo.)

Defendant/Appellant.

PETITION FOR REHEARING

The Appellant, Joseph M. Bennett, Pro se, hereby moves this Court to reconsider it's order dated July 8th, 1993.

As grounds therefore, the Appellant respectfully states that this Court failed to address the most important issue raised in the Appellant's brief. The District Court denied the Appellant's Motion to Withdraw **without a hearing**. In the Order and Judgment dated July 8th, this Court asserted that "[t]he District Court denied the motion after holding a change of plea hearing . . . ." See Order and Judgment, p. 2, ll. 7 & 8.

In fact, **no** hearing was held on the Appellant's motion to Withdraw the Plea. It is fundamentally unfair for the Appellant to be faulted for failing to show Government violation of the Plea Agreement when he was not allowed a hearing and the opportunity to show this violation.

Pages 4 & 5 of the District Court Docket Sheet is attached and marked as Exhibit A. The Appellant requests consideration of the following facts and legal arguments:

On May 7th, 1992, the Appellant petitioned the District Court to withdraw his plea. This occurred two months after the Appellant's March 2nd trial date with it's resultant Plea Agreement and after the Appellant had talked with a number of people regarding the Government's handling of their plea agreement. The U.S. Attorney's reply Brief erroneously makes the statement that the Appellant filed this motion four days after the plea agreement. See Appellee's Brief, p.3, ll. 4-14. If a motion to withdraw a guilty plea alleges facts that might justify relief, the District Court must hold a hearing to allow the Defendant adequate opportunity to develop support for his reasons for wanting to change his plea. United States v.

Hancock, 607 F.2d 337, 337-338 (10th Cir. 1979); United States v. Crooker, 729 F.2d 889, 896 (1984).

On May 8th, the District Court issued a minute order asking the Government to respond. On May 12th, the U.S. Attorney entered his response and referred to the Appellant's claim as "baseless." However, the U.S. Attorney did not then and has never since claimed that the Government would be prejudiced by allowing the withdrawal. Where prejudice to the Government is absent or minimal, withdrawal is routinely permitted. United States v. Roberts, 570 F.2d 999, 1002 (D.C. Cir. 1977), aff'd 445 U.S. 552 (1978).

The following day, May 13th, the District Court denied the Appellant's motion by way of a minute order and therefore never outlined her reasons for the denial. This Court was thus denied a clear and complete record with which to determine whether the District Court has acted within it's discretion. Failure of the District Court to hold a hearing and outline it's reasons for denial of the guilty plea, when the Government fails to demonstrate any prejudice by allowing the withdrawal is an abuse of discretion. Hancock, 607 F.2d at 338.

Then on May 18th, the day of the sentencing hearing the Appellant had issued a subpoena for one of his witnesses and that witness was present. The Appellant's attorney requested that this witness be allowed to testify but the request was denied.

The District Court refused to allow the Appellant to present evidence that the Government had broken it's plea agreement. The District Court could have easily allowed a hearing, and thereby provided a record for review, but it didn't. It also failed outline it's reasons for denying the Appellant's motion to withdraw his guilty plea. Any one of these actions could provide a credible basis for a finding that the District Court abused it's discretion. The combination of these actions, in light of the fact that the District Court wished a speedy resolution to this case surely amounts to an abuse of discretion.

Therefore, the Appellant, for the foregoing reasons, urges the Court to overturn the District Court's ruling.

Dated this 21st day of July, 1993.

Respectfully submitted,

Joseph M. Bennett
Pro se,

CERTIFICATE OF MAILING

I hereby certify that I have served the foregoing APPELLANT'S REPLY BRIEF upon the other parties herein by depositing true copies thereof in the United States mail, postage prepaid, this 21st day of July, 1993, addressed to the following:

James R. Allison,
Assistant United States Attorney
Office of the U.S. Attorney
1200 Federal Office Building
1961 Stout Street, Drawer 3615
Denver, Colorado 80294

Joseph M. Bennett

EXHIBIT C

TENTH CIRCUIT COURT OF APPEALS DENIAL OF PETITIONERS MOTION FOR REHEARING

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

United States of America,

Plaintiff - Appellee,

v. No. 92 - 1161

Joseph M. Bennett,

Defendant - Appellant,

ORDER
Entered August 12, 1993

Before TACHA, BALOCK, and KELLY, Circuit Judges.

Upon consideration of the appellant's petition for rehearing in the captioned case, the petition for rehearing is denied.

Entered for the Court

Robert L. Hoecker, Clerk

EXHIBIT D

DEFENSE WITNESS TESTIMONY OF CHARLES BRETZ

(See the defense witness transcripts of the Petitioners July 8-12, 1991 trial. Beginning on page 104, line 9.)

Next witness?

MR. STEINBERG: Call Charles Bretz.

THE COURT: Would you ask Mr. Bretz to come in, please.

THE COURT: Please raise your right hand, sir.

CHARLES BRETZ,

called as a witness by the defendant, having been first duly sworn, was examined and testified as follows:

THE COURT: Please have a seat.

DIRECT EXAMINATION

BY MR. STEINBERG:

Q. State your full name and spell your last name, please.

A. My name is Charles Bretz. The last name is spelled B-R-E-T-Z.

Q. And what city and state do you reside in?

A. I reside in Joliet, Illinois.

Q. And what is your occupation?
A. I'm an attorney.
Q. And how long have you been an attorney?
A. For nine years.
Q. Are you licensed to practice law in any other states?
A. Yes, in Illinois, in both state and federal courts.
Q. In terms of your relationship with Joe Bennett, do you recognize him seated at the table?
A. Yes, I do.
Q. And how did you come to meet Joe Bennett.
A. I met Joe Bennett several years ago. He was an acquaintance of my father. My father is a minister, at the time had a church in the Joliet area. The church owned some property, including an apartment building that was subsequently purchased by Mr. Bennett; and at the time I was much younger. I think I was probably in college at the time, but I just met him through being around in that capacity.
Q. I want to direct your attention to November 21, 1989, and ask if you had occasion to meet with Mr. Bennett and two F.B.I. agents in your office.

A. Yes, I did. It would have been in late afternoon, early evening.

Q. Do you recall the names of those two agents?

A. I believe they were Dave Kirchner and Chuck Pearson.

Q. Now, did you have an opportunity to discuss with Mr. Bennett the reason why these two individuals were at your office?

A. Yes, I did.

Q. Had you ever prior to your explaining the church situation met with or had any discussions with Mr. Bennett?

A. I had never represented him or anything. I would see him around from time to time, but I hadn't represented him as legal counsel.

Q. All right. I want to focus your attention on discussions you had with the F.B.I. concerning the events that night.

A. Okay.

Q. Tell me if you said anything to the F.B.I. regarding concern for abuse of Nicole.

A. Yes, I did. After they showed up at my office, meaning Joe Bennett and the two agents, I had brief conversation with Joe Bennett about what was going on; and then I talked to the

agents, had multiple conversations with them as to the situation involving Nicole Schoenekase. What ultimately came out of that is that the agents made promises to me and to Mr. Bennett that if we were able to procure the return of Nicole that they would either themselves or through the appropriate agencies investigate the allegations of child abuse and would make sure that Nicole was placed in the appropriate agency and taken care of.

Q. After those discussions, did you, in fact go get Nicole?

A. Yes, I did.

Q. And tell us how you found her.

A. Well, I was given instructions to go to a hotel; and my wife and I drove up there and got her, brought her back.

Q. And tell us how she appeared.

A. She appeared fine. She was well kept. My wife is pretty good with kids, and they hit it off pretty well; and she actually fell asleep in the car on the way back to my office.

Q. And did you return her at that point to the F.B.I.?

A. Yes. We came back to my office where the agents and Joe were waiting, and we stayed there for a period of time while the agents made some phone calls, at least some of

which were to the Department of Children and Family Services in Illinois. And during that time, my wife and I played with Nicole until the appropriate people showed up to take her.

Q. Did you subsequently call the F.B.I. in this matter?

A. Yes I did. It was a few weeks later that there was a hearing that took place in Will County, Illinois, in which I was involved, pertaining to allegations of abuse and neglect toward Nicole.

And following up on the promises that I had received that night from the agents, I called the Orland Park office; and I believe I talked at one point to Agent Kirchner, and I'm pretty sure I talked to their supervisor. I think his name was Johnson. But after a couple conversations with them, I was getting nowhere. It was apparent that they weren't going to be of any help to us whatsoever.

Q. Did the matter proceed to hearing in the State of Illinois?

A. Yes, it did.

Q. And over how long a period of time did that hearing take?

A. That hearing lasted, I'd say -- I think it was about four days, the better part of a week.

Q. And what was the result of that hearing? What was the judge's findings?

A. The judge's findings were that Nicole had been abused by her mother, Debra Dodson, and stepfather, Rick Dodson, and that she had been the victim of neglect as well.

MR. STEINBERG: Could I have Exhibit A placed before the witness?

THE WITNESS: Thank you.

BY MR. STEINBERG:

Q. Do you recognize that particular document?

A. Yes, I do.

Q. And what is it?

A. This is an exemplified copy of the order that was entered at the conclusion of that hearing which I just described, and it sets forth the finding that there was neglect and abuse found to have taken place. The order is signed by Judge Vince Cerri, who was the presiding judge; and the top page is a document signed by the clerk and the judge certifying this to be a correct record.

Q. And you stated that it was "exemplified." What does that word mean?

A. "Exemplified" is a word that means that it's certified to be correct. When a document is certified for use out of state, rather than just having the clerk certify that it's the appropriate document, further steps are taken. The clerk certifies that it's the appropriate document, the judge certifies the clerk is the clerk, and the clerk certifies that the judge is the judge.

MR. STEINBERG: At this point, Judge, we move for the admission of Defendant's Exhibit A.

THE COURT: No objection?

MR. ALLISON: We've stated our position, your honor. Thank you.

THE COURT: Exhibit A is admitted.

BY MR. STEINBERG:

Q. Is there a portion where the judge speaks his findings?

A. Yes, there is.

Q. Could you read that, please.

A. Yes, the court found "that the minor is a person as described in section 802-3 of the Juvenile Court Act" and that the minor is first of all "neglected as per section 802-3 of the Court Act, to whit: The minor's environment was injurious to her welfare"; that "said neglect was caused by Rick Dodson

and Debra Dodson"; further, that the minor was "abused as per section 802-3 of the Juvenile Court Act, to wit: Whose mother and stepfather, persons responsible for the minor's welfare, inflicted, caused to be inflicted, or allowed to be inflicted upon such minor physical injury, by other than accidental means which caused impairment of physical of physical or emotional health and who created a substantial risk of physical injury to such minor by other than accidental means which would have been likely to cause impairment of emotional health."

The judge further found that "said abuse was inflicted by or allowed to be inflicted by Rick Dodson," and that was the extent of it. . . . . .

(See the defense witness transcripts of the Petitioner's July 8-12, 1991 trial. Page 119, line 7 of Charles Bretz's Cross-Examination by James Allison.)

BY MR. ALLISON:

Q. Isn't it true on January 9, 1990, 26 days after the finding that the child had been abused and neglected, the presiding judge, Judge Cerri, ordered in part that the child be returned to the custody and guardianship of Nicole -- or her natural mother, Debra Dodson?

A. I believe that's true, and my understanding was with strict supervision from the Department of Children and Family Services.

Q. I understand. I understand. I'll show you what has been marked for identification as Government's Exhibit 66. Is that a copy -- excuse me -- after you've had a chance to review it.

A. I've had a chance to read it. Thank you.

Q. And is that the order that was issued on January 9, where as you said, Nicole Schoenekase was returned to her natural mother under strict supervision?

A. Yes, this is an order signed by Judge Cerri on January 9 of 1990, that returned custody and guardianship to Debra Dodson and required Debbie and Rick to attend and complete parenting classes, attend counseling --

Q. Mr. Bretz, we'll just let the order speak for it'self and the jury can review that at their leisure, if that's okay?

A. That's fine. I just wanted the full ramifications to be heard. That's all.

. . . .

(See the defense witness transcripts of the Petitioner's July 8-12, 1991 trial. Page 125, line 8, of Charles Bretz's

Cross-Examination by James Allison.)

Q. Now, you indicated on your direct examination that the F.B.I. promised that Nicole would be placed with the appropriate agency. Correct?

A. Well, they made various promises. That was one of them.

Q. That's what you testified to on direct. Correct?

A. Yes, that was one of the things that they said.

Q. And when, in fact, Nicole was recovered, she was turned over to the Department of Children and Family Services, which is the appropriate agency; correct?

A. That was the one thing they did do, yes.

Q. And what you told the jury is that they promised to investigate the abuse, and when you called them back, they told you they wouldn't do it. Is that what you're telling this jury?

A. No, what I'm -- that's not entirely correct. What the agents told me is -- or led me to believe, anyway, is that either they would or they would have the appropriate agency investigate these allegations of child abuse. And when I called them back to request their aid in my efforts to determine the nature and extent of the abuse and neglect, it was quite apparent that they had no interest at all in helping me in that endeavor.

Q. Mr. Bretz, are you aware that they interviewed David Hightower on several different occasions about the allegations of abuse? Are you aware of that?

A. I'm aware that they talked to him at some point, but I don't think it was at that time.

Q. Are you aware that they spoke with Clydeil Sweica on several different occasions concerning these allegations? Do you know, or don't you know?

A. Well I think that they did talk to people, sir; but the point was that there was a hearing going on right at that time --

Q. I understand.

A. --involving the allegations of abuse and neglect, and that's when we needed the help, and that's when I asked them to come through and follow up on their promises; and they just wouldn't do it.

Q. Isn't it true that they had several conversations with Barbara Boyd and reported what she knew about the case?

A. I'm quite certain that they had no conversations with any of those people at point. I think it was only later, when they were doing their work on this case, that they started talking to all those people and talked to them several times. It was not an

investigation being done as to the allegations of abuse and neglect that were taking place at that hearing. It was sometime later; and it involved this case, not that one.

Q. But you can't sit there now and say that the F.B.I. failed to complete a thorough investigation concerning the alleged abuse of Nicole before this trial, can you? You're only saying you weren't satisfied with their services before the hearing in December of '89. Correct?

A. I most certainly can say that they did not do a complete investigation because of the fact that at the time when the issue of neglect and abuse was being heard, they did absolutely nothing. What happened is later on, when they were putting this case together, that they started doing their investigation, after the fact and after it wouldn't do any good as far as what we were doing to establish the abuse and neglect.

Q. Well, Mr. Bretz, you got the court order.

A. I did, no thanks to them, sir.

Q. But my point is at this point is time, before this trial, you can't accuse the F.B.I. of not having done a thorough investigation in this case.

MR. STEINBERG: I'm going to object. It's argumentative; and also, it's been asked and answered.

THE COURT: I think you're -- probably your question has been answered, Mr. Allison. The objection will be sustained.

BY MR. ALLISON:

Q. Well, in fact, an investigation concerning the abuse and neglect was done by the appropriate agency; isn't that correct? The Denver -- the Illinois Department of Children and Family Services. They're the ones who investigate allegations of child abuse, and they did such an investigation and presented that and their recommendations to the court in these hearings; correct?

A. No. that's not entirely correct.

Q. They did not investigate the matter? Are you telling me that the Department of Children and Family Services did not investigate the matter that was going to be presented before Judge Cerri? Yes or no? Did they or didn't they?

MR. STEINBERG: I object.

THE WITNESS: I can't answer that with a yes or no.

THE COURT: If he can't answer yes or no, he may answer fully. Go ahead, please.

THE WITNESS: Thank you, your Honor. What I was looking to the F.B.I. for was to help me.

MR. ALLISON: It's not responsive.

THE WITNESS: It will be.

MR. ALLISON: I ask him --

THE WITNESS: It will be responsive.

THE COURT: Would you try to answer the question. You don't have to answer it yes or no, but would you answer the specific question.

THE WITNESS: I am, your Honor.

MR. ALLISON: If we could have the question read back, please.

THE COURT: I don't think it needs to be read back. He may answer.

THE WITNESS: I understand the question.

What I was looking to the F.B.I. for was to help me with the things that had happened in Denver, because of the fact that they are a nation-wide organization and I needed some help enlisting the aid of people in Denver to do things.

The Illinois Department of Children and Family Services did do an investigation of sorts, but they were limited in what they can do because all they could do is talk to people who were in Illinois; and we felt that there was a lot of things that could be brought to light by an investigation in Denver. And that's the help I was seeking, which I did not get.

BY MR. ALLISON:

Q. Okay. But that is limited, again, only to your comment on what the F.B.I. did for you before the hearings in December, not on what they have done before this trial.

A. Well from the conversations that I've had with people and from what I've gathered, the -- the point of their investigation was to try to establish a case of kidnapping against Mr. Bennett. And I do not personally feel that they were making an investigation into allegations of abuse and neglect.

Q. Can you explain how they came up with Nurse Laurie Brody, John Peltz, Laura Walker, Claire Dodson --

MR. STEINBERG: I object. This is unfair, because there are lots of other people that testified here --

MR. ALLISON: That's correct.

MR. STEINBERG: -- that the F.B.I. didn't come up with: and he doesn't know about them, either.

BY MR. ALLISON:

Q. You don't even know those people, do you?

A. No, I don't; but I think I can explain the fact -- because of the fact that there was abuse and neglect going on, so it wouldn't be too hard to find people to testify about it.

. . . .

EXHIBIT E

DEFENSE WITNESS TESTIMONY OF JOSEPH P. VEGA

(See the defense witness transcripts of the Petitioners July 8-12, 1991 trial. Beginning on page 43, line 14.)

Q. And do you know about how old Nicole was in the summer of '89?

A. She was two years old.

Q. Did you observe Rick around Nicole in the summer of '89?

A. Yes, I did.

Q. How would you describe that relationship?

A. Very, very shaky. Rick was a -- didn't like her too well.

Q. What makes you say he didn't like her?

A. Well, he did -- he did a lot of abusive things to her.

Q. Such as what that you saw?

A. For one instance, I seen him when she was bathing comfortably, he would take a pitcher of water out of the refrigerator and pour it on top of her head and make her scream. Other instances, like she would be crying and he'd stuff a dirty sock in her mouth to shut her up, get a garden hose, a high - pressure garden hose and knock her down with water, throw tools at her. Just constant verbal abuse.

Q. When he would verbally abuse her, would he have any particular name that he would call her?

A. He'd call her a little bitch. That was particular -- that was mostly the name he gave her.

Q. And he would say this in front of her?

A. He'd say, yes, right to her, right in front of Debbie and in front of Nicole.

Q. And what did Nicole do?

A. Excuse me?

Q. What did Nicole do when she was being called this?

A. Just -- I don't believe she understood. Just kind of -- she really didn't understand what he was calling her, but I'm pretty sure she -- she got frightened by it.

Q. How do you know that?

A. Because of the tone of voice he used.

Q. Would she come to him, or how was she around him?

A. She wouldn't come to him at all. She was terrified of Rick.

Q. And how do you know that?

A. Well, because when I used to come over, she used to come to me. And when Rick would go and try to grab her, she would run away from him and try and get away from Rick.

Q. Did you ever baby - sit Nicole for an extended period of time?

A. Yes I did.

Q. When was that?

A. One time when Debbie and Rick left to Illinois, they left some girl in charge of baby-sitting, which she didn't baby-sit. She left. So Rick and Debbie then asked me to watch over Nicole.

Q. And that person who was supposed to be in charge -- was that Cheryl Hackney?

A. Yes, It was.

Q. She just left?

A. Yes, took a plane and left.

Q. So you were there at the house with who?

A. I was at the house with a girl named Renee -- Renee Serino.

Q. And who else was there.?

A. Nobody else.

Q. Nicole?

A. Yes, and Nicole was there.

Q. And how many days were you there baby-sitting that child?

A. Approximately three days.

Q. And was that 24 hours a day?

A. Yes, it was.

Q. And would you cloth and feed and bathe the child?

A. Yes, I did.

Q. Now, did Rick do anything in terms of cans?

A. Yes, he spit in her pop can. I remember one instance he even gave her some dogfood, because he had quite a few dogs there at his house.

Q. First, let's talk about the can. What would he do with the can?

A. He'd spit in the can and give it to her, spit in the pop can and pass it to her.

Q. And what would he say to her if anything?

A. Laugh about it jokingly.

Q. Would he suggest in any way that she drink or not drink?

A. No, he would tell her to drink it.

Q. Now, in terms of Debra Dodson, when you were there, was there marijuana usage going on?

A. Yes, quite often. Debbie was quite a marijuana smoker. In the morning, she would be high. I would get there in the morning and the house would smell like marijuana.

Q. And who supplied her, to your knowledge, the marijuana?

A. I believe some girl, some blond-headed girl. That's all I know. I had seen her go over there, because Rick would give her the money to purchase the marijuana.

Q. And was that on a fairly regular basis?

A. Yes. It was like once every two days.

Q. Now, did he ever throw anything at Nicole that you saw?

A. He threw a tool at her a few times and even a rock. Oh, he threw a dogs bone at her as well.

Q. Why didn't you do something?

A. Well, I didn't want to get -- I would -- we had a good business going. I was making quite a bit of money there, so, you know, I figured if I did something, i might get in trouble, you know, Rick might retaliate and ---

Q. How would he retaliate?

A. Well, I'm not sure. I just, you know, didn't want to lose my business there; so that's -- I actually really just kind of looked the other way.

Q. Were you happy about that?

A. No, I'm not.

Q. At that time, was Rick one of your best friends?

A. Yes, he was.

Q. Did you ever make an anonymous call to anybody in this case?

A. Yes, I did.

Q. And who was that?

A. Joseph Bennett.

Q. And why did you do that?

A. Well, David Hightower gave me a number a few weeks before Nicole got kidnapped and said if Nicole is ever in any trouble to give him a call, to give him a call at this number.

Q. Did you think Nicole was in trouble?

A. Yes, I did.

Q. Why?

A. Well, she started not to eat after a while and started getting real thin.

Q. And is that when you made the phone call?

A. Yes, I did. She was real shaky all the time.

MR. STEINBERG: Thank you very much.

I have nothing further, your Honor.

THE COURT: Cross-examination, please.

CROSS-EXAMINATION

BY MR. ALLISON:

Q. First, Mr. Vega, this business that you had -- it did not involve the interstate transportation of stolen vehicles, did it?

A. No, it didn't.

Q. You're just talking about wrecked cars, sometimes restoring them, sometimes taking them to the crusher, but it wasn't an interstate car theft ring.

A. That's correct. We used to take insurance claim cars repair them and resell them.

Q. You said you didn't want to say anything because you didn't want to lose your good business?

A. That's correct.

Q. You were making good money and you didn't want to say anything because you were more interested in keeping that job?

A. Yes, that's correct.

Q. Now, you said you made an anonymous phone call to Joe Bennett?

A. Correct.
Q. Did you tell him to come out and take the kid?
A. Could you repeat that question?
Q. Did you tell him to come out to Denver and snatch the child?
A. No, I didn't
Q. You never did that: Took the child and hid it from her parents?
A. No, I never did that. I have three kids of my own.
Q. Right. Let me ask you this: You talked with Special Agent Reginald Powell --
A. Yes.
Q. -- senior agent with the FBI on at least three different occasions; and not once did you ever tell him about these acts that you claim Rick Dodson perpetrated upon Nicole, did you?
A. Yes, I did. I told him when I was in the county jail, but he wasn't interested in what Rick did to Nicole. He was more interested about what I knew about Hightower and Bennett.
Q. You're telling this jury that you told Special Agent Powell about those acts that Rick committed against Nicole -- you're telling them that you told him that?

A. That's correct.

Q. Okay. You said that Nicole looked very bad just before the kidnapping?

A. Yes, sir.

Q. Were you aware that she was being seen by a nurse at that time, regularly, a visiting nurse?

MR. STEINBERG: Just a second. It wasn't regularly. It was twice.

THE COURT: Would you restate the question. I think that's correct. It may not have been regularly.

BY MR. ALLISON:

Q. Were you aware that Nicole had been seen twice before the kidnapping by a visiting nurse?

A. There was an occasion where I did see one nurse one time; but I didn't see her examine Nicole, just the other child.

Q. You don't have any medical training?

A. Excuse me. No, no, I don't.

MR. ALLISON: No further questions.

REDIRECT EXAMINATION:

BY MR. STEINBERG:

Q. In terms of when Agent Powell saw you, that was before Nicole had been recovered or was it after?

A. It was after.

Q. And did he ask you, "Did you see any abuse by Rick Dodson?"

A. No, he didn't ask me that question.

Q. Was what he wanted to know about what you knew about Joe Bennett?

A. Right. Mostly about David Hightower, if he knew -- if I knew of any women that he dated or if any -- anything like that, or any people he knew and what bars he hung out, mostly questions like that.

Q. So he never said, "Did you see any abuse of Nicole?"

A. No, he didn't ask me that question.

Q. Did anybody ever ask you that from the FBI?

A. No.

MR. STEINBERG: Nothing further, your Honor.

MR. ALLISON: Just very -- one more question, please, your Honor.

THE COURT: Go ahead.

BY MR. ALLISON:

Q. You never volunteered it, either, did you?

A. Yes, I did, but I told him that Rick used to abuse the girl quite often, but he never -- he didn't acknowledge it or he didn't write it down.

MR. ALLISON: Okay. Fine. Thank you.

THE COURT: Nothing further?

. . . .

EXHIBIT F

PETITIONERS CHANGE OF PLEA HEARING
MARCH 2, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 91-CR-29

United States of America,

Plaintiff,

vs.

Joseph M. Bennett,

Defendant.

REPORTERS TRANSCRIPT
(Hearing on Change of Plea)

Proceedings before the HONORABLE ZITA L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 11:40 a.m., on the 2d day of March, 1992, in Courtroom C-502, United States Courthouse, Denver, Colorado.

APPEARANCES

Michael J. Norton, United States Attorney, by James R. Allison, Assistant U.S. Attorney, by James R. Allison, Assistant

U.S. Attorney, 1961 Stout Street, 12th Floor, Denver, Colorado, 80294, appearing for the plaintiff.

SPRINGER & STEINBERG, BY HARVEY A. STEINBERG, Attorney at Law, 1600 Broadway, Suite 1500, Denver, Colorado, 80202, appearing for the defendant.

PROCEEDINGS

THE COURTROOM DEPUTY: The matter now before the Court is United States of America vs. Joseph M. Bennett, Criminal Action No. 91-CR-29.

THE COURT: Mr. Allison, you're representing the Government in this case?

MR. ALLISON: Yes, your Honor.

THE COURT: And I see Mr. Bennett is here.

How are you Mr. Bennett?

THE DEFENDANT: Fine, ma'am.

THE COURT: We have a jury panel downstairs, and I did not want the clerk to let the panel go until we see whether we do actually have a disposition in this case.

I must admit, Mr. Bennett, that I have pushed both the Government and your attorney a little bit to see if they could reach an agreement, because it seemed to me that it was just

extremely sensible. For you to take a chance to go to trial and have a jury convict you, which would put me in a position of sending you to a Federal prison, which was not at all comfortable for me, nor was it comfortable to do anything else, because there were really problems with whether you had, in fact, violated the law.

If you worked out a disposition, I would think that would really be the best answer to a knotty problem. However, I want to say from the very start that the person that has to make a decision on a disposition is you. The attorneys can't do it; I can't do it. You're the one who has to make the ultimate decision.

So let's see if we do have a disposition now, and we'll just go through the various paper work and see if Mr. Bennett has any questions and whether he really wants to have a disposition or whether he'd prefer to go to trial.

MR. ALLISON: Your Honor, first of all, we would ask the Court to waive the requirements of local rule 87-1 requiring a written plea agreement before the Court. We have arrived at this just moments ago, and we would ask the Court to be relieved of that obligation under the local rule.

THE COURT: All right.

MR. ALLISON: I'd like to state the disposition orally as I understand it at this time.

THE COURT: I take it you have no objection to waiving the requirement of a written plea agreement.

MR. STEINBERG: Very well, because we're making a record; and I indicated to Mr. Bennett that if we ever needed to have that transcribed, it would essentially be a written record.

THE COURT: That's right. It would be.

Okay. It will be waived.

MR. ALLISON: Your Honor, we present this disposition to you under the Rules of Criminal Procedure Rule 11 (e) (1) (c), and we have had discussions with one another and with the Court. And we suggest in light of the trial and the evidence that the Court heard that there would be grounds for a departure in this case, but that departure would appropriately be to probation; and that would be our recommendation to the Court. I believe the Court has indicated to us that it would be agreeable with the Court.

We have also agreed upon the defendant's plea in this information that no further charges will be brought against him

concerning this entire incident that occurred between the summer of 1989 and concluding on or about January 6, 1991.

We would ask the Court to take judicial notice of the facts of the previous trial and to rely upon that as a factual basis for this plea.

Upon the Court's acceptance of this plea agreement, and upon the defendant's plea of guilty and at this time -- at the time of his sentencing, we would file a motion to dismiss the indictment that has heretofore been returned by the grand jury.

We also -- we have not discussed this, but I would have no objection to the terms and conditions of the defendant's bond being continued pending the preparation of the presentence report.

THE COURT: Well, I guess the first thing -- well, before we even go ahead with talking about waiver of indictment, is there anything you want to add to that Mr. Steinberg?

MR. STEINBERG: Judge, it's my understanding that Mr. Bennett will not be asked before a grand jury and asked any questions concerning who might have assisted him in any

of the events that underlie this indictment, as well as this information.

MR. ALLISON: We do not intend to supoena him before the grand jury, your Honor. If the defendant wishes to come forward, that's his choice; but we do not intend to supoena him in the grand jury.

THE COURT: Okay. This case is going to go by information.

MR. STEINBERG: Yes, your Honor. the only other thing that I should inform the Court is that I personally advised Mr. Bennett that I would assist him in investigating any matters relative to possible child abuse concerning the minor child, Nicole Schoenekase, in the State of Utah and would also urge the State of Illinois to exercise their jurisdiction in at least bringing the minor child back to the State of Illinois, to make sure that the court's orders are fully complied with.

Mr. Allison has graciously indicated that he would assist in an investigation here, if we supplied him with the names of any witnesses that Mr. Bennett feels need to be interviewed. In that regard, he's agreed he would personally do that, and he would present a package to my office that we could send out

to Utah and Illinois, given the historical situation in this case; specifically, the evidence of child abuse they need to take a look at.

THE COURT: You know, it might be comforting to Mr. Bennett to know that Utah at least has investigated some complaints or suspicions and that there are several individuals there who apparently are aware that there have been some hint of a problem in the past; for example, the physician that takes care of the children and the head start teacher.

MR. STEINBERG: Judge, he's had an opportunity -- I believe the Court is making reference to documents that were provided to the Court pursuant to a Rule 17 motion filed by the Government. All those documents have been presented to Mr. Bennett; and it's our intention -- and I don't know whether it's relevant now -- it's our intention obviously to have somebody in Utah see why the child has not been sent back to the State Illinois to comply with whatever orders the State of Illinois has issued, because as the Court is aware, Judge Cerri in Illinois issued certain orders and those haven't been complied with.

THE COURT: I'm not aware -- I haven't looked at these that closely to see if Utah even knows about his orders.

MR. STEINBERG: I don't believe they do, and that's one of the things that we intend to address.

THE COURT: This is something that the Court is not going to get involved in, but maybe you folks should. Where the child has what appears to a strong support system in Utah with head start teacher, personal physician, and others, it might be a really better environment there than in Illinois. I don't know. That's something to think about.

MR. STEINBERG: Those are the things that we need to take a look at, your Honor.

THE COURT: Well Mr. Bennett do you have any questions about the plea agreement?

THE DEFENDANT: No, ma'am.

THE COURT: Let's talk about the waiver of indictment a moment, because it's very important that you understand that you have a constitutional right to demand a grand jury look at these new charges. If you give up your right to a grand jury looking at them and proceed by information, we're going to treat the information just like an indictment and proceed on that.

Now, the information here is just the charge signed by Mr. Allison. It's not a grand jury. Do you understand that you have the right to demand a grand jury to look at this matter if you wish to do so?

THE DEFENDANT: No, I didn't understand that.

THE COURT: Okay. Well, you indeed do, if you don't want to go by information. If you want to appear before the grand jury, you certainly can refuse to proceed by information.

THE DEFENDANT: No, I understand that, but I hadn't discussed that with Harvey, so I don't really have an opinion.

THE COURT: Go ahead and take a moment if you need to discuss it.

THE DEFENDANT: I understand, ma'am.

THE COURT: The reason I thought you had talked about it is that you signed a form that is entitled "Waiver of Indictment."

You understand that a grand jury is a group of citizens, anywhere from 16 to 23, and it takes twelve to indict; and originally, we did have an indictment of this case but on a different charge.

Now, has anyone threatened you in any way to get you to sign this waiver or to give up your right to indictment?

THE DEFENDANT: No, ma'am.

THE COURT: These are questions that I have to ask not only to satisfy myself that you're entering into this agreement freely but also to make a formal record that you are doing so.

THE DEFENDANT: My only statement would be that I entered into the agreement specifically with the idea that the FBI would assist -- the FBI and also Harvey would assist -- Jim Allison personally. I'm sorry.

MR. STEINBERG: Not the FBI.

THE DEFENDANT: -- would assist in helping with Nicole's investigation.

MR. STEINBERG: As indicated on the record.

THE COURT: All right. And that is what you've indicated already, basically, or --

MR. ALLISON: It's what Mr. Steinberg has -- Mr. Bennett, according to Mr. Steinberg, is very interested that we produce information concerning this case to Mr. Steinberg. If we have not already, we will do that. If there are witnesses

that need to be talked to, I've told him if Mr. Steinberg can't do it, I'll be happy to do it personally. In other words, there will be a -- there will continue to be a free flow of information between the Government and Mr. Steinberg. And if he has special requests that they want me to interview someone, I'll be happy to do it. If they want a packet put together showing what is available in this case, we'll do that, too.

We're not trying to hide anything from Will County. I've made that clear to them and just -- I don't know what else to say. I can't --

THE COURT: It's a little unusual for a United States Attorney to get mixed up in a potential or alleged child abuse case, because this is usually handled by the local authorities.

MR. ALLISON: I understand; and I can't substitute my judgment for that of the state of Illinois, and I do not intend to do so.

THE COURT: Or for the state of Utah.

MR. ALLISON: Or for the State of Utah. But if there is anything I can do to facilitate an investigation, talking to folks, I'll be happy to do that.

THE COURT: Well it looks to me like you've got much more of an agreement than normally one gets in a case which is usually for state action, not for Federal.

THE DEFENDANT: I'd like to add, though, that irregardless (sic) of whether the FBI had jurisdiction in child abuse, they did agree to fully investigate the child abuse. And that was a condition that I released Nicole to them under, and that agreement wasn't kept. And Jim Allison saying that he's going to help is -- that's the best we can do, and I'll accept that.

. . . .

EXHIBIT G

STATEMENT FROM ELLEN CARVER

MEMORANDUM

TO: HARVEY STEINBERG, ESQ.

FROM: ANTHONY DIVIRGILIO

DATE: MAY 11, 1992

SUBJECT: INTERVIEW WITH ELLEN CARVER
2318 BISMARK COURT
LOVELAND, CO 80538; 669-0418

RE: BENNETT

On this date I contacted the above party and identified myself as a private investigator on behalf of attorney Harvey Steinberg who represents Joe Bennett.

Ms. Carver advised me that she contacted FBI Agent Reg Powell at his office for the purpose of informing him that she had received court records and Dodsons criminal records from Joe Bennett and wanted to know what the FBI was doing to assist Nicole.

Ms. Carver informed Reg Powell that she felt Nicole was in "grave danger" and wished to be of assistance to Nicole. Reg Powell then questioned her as to whether she was "the person who helped" and tried to convince Ms. Carver that Dodson and Debbie were the victims because their child had been kidnapped, that Dodson was simply a "misguided young man" and Nicole was in no danger.

According to Ms. Carver, Reg Powell also told her that Joe Bennett was the criminal and was trying to manipulate her. Reg Powell indicated to Ms. Carver that he wanted the papers given to her by Bennett and offered to personally come that night and pick them up. Further, according to Ms. Carver, the paperwork consisted of witness statements, court records and Dodsons criminal records.

According to Ms. Carver, Reg Powell was attempting to identify the female who helped Joe Bennett take Nicole and connect her to a kidnapping ring.

Ms. Carver checked her phone bill and informed me that she had conversations with Reg Powell several times on March 23rd.

I asked Ms. Carver how she had become aware of the case and she replied that she had read about it is the Denver Post and wrote a letter to the editor praising Bennett. She was then contacted Mr. Bennett, who asked that she look at information he would provide and "follow her conscience".

Ms. Carver expressed the conviction that the FBI works for the public and needs to know that citizens are holding them accountable to do the right thing. Her motivation was simply to help Nicole.

I questioned Ms. Carver regarding any communication with Jim Allison. Ms. Carver indicated that she spoke to Jim Allison, explaining who she was, how she heard about the case, that Bennett sent her the information and that in her opinion, she felt that Nicole's life was in danger and wanted to help Nicole. She characterized Allison's attitude as defensive of Dodson and belittling of any danger to Nicole.

Ms. Carver dismissed Allison's reassurances as tainted by his role as Dodson's defender and his special interest in the case.

In the course of conversation with Allison, Ms. Carver mentioned that the papers she held showed the Dodsons as

having been investigated in Illinois and found guilty of child abuse and neglect, investigated in Denver and now being investigated in St. George, Utah. Allisons reply to her indicated that they were no longer in Utah and that he may know their present whereabouts.

When asked whether Allison appeared to still be investigating the case or pumping her for information, she replied that he gave the impression of "wanting to get rid of her" after determining that she was not a threat. Ms. Carvers impression was that the case was no longer being actively investigated.

Ms. Carver checked her phone bill which showed conversations with James Allison on March 23rd, 30th and 31st.

Ms. Carver also informed me that she spoke to the Denver Police Department and D.A.'s office. Sergeant Robert Padilla of DPD spoke to her indicating that they do not expect a felony conviction of Dodson. She then called Mike Pillow (PH), Denver D.A., who referred her to Kyra-Jenner (PH). Ms. Carver also understood, but couldn't remember specifically

being told, that James Allison had turned over all files on Dodson to Kyra Jenner.

Ms Carver expressed concern for putting her name on public record against Dodson, who she considers a threatening individual. With that consideration, she said she would be willing to help if it would benefit Nicole, but if her concerns are being used solely for the benefit of Bennett, she would have reservations.

In closing, it is Ms. Carvers opinion that neither the FBI or James Allison were interested in pursuing any investigation of a legitimate threat to Nicole by Dodson. When asked whether in her opinion the FBI was doing anything to assist in helping Nicole, Ms. Carvers response was, "Oh, not at all in my opinion."

cjh 05/12/92

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